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2
3 **BEFORE THE FEDERAL ELECTION COMMISSION**
4

5 In the Matter of)
6) DISMISSAL AND
7 MUR 6492) CASE CLOSURE UNDER THE
8 ERIE COUNTY (OHIO) REPUBLICAN) ENFORCEMENT PRIORITY
9 PARTY) SYSTEM
10)
11

12 **GENERAL COUNSEL'S REPORT**

13 Under the Enforcement Priority System ("EPS"), the Commission uses formal
14 scoring criteria to allocate its resources and decide which cases to pursue. These criteria
15 include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both
16 with respect to the type of activity and the amount in violation, (2) the apparent impact the
17 alleged violation may have had on the electoral process, (3) the legal complexity of issues
18 raised in the case, (4) recent trends in potential violations of the Federal Election Campaign
19 Act of 1971, as amended ("the Act") and (5) development of the law with respect to certain
20 subject matters. It is the Commission's policy that pursuing low-rated matters, compared to
21 other higher-rated matters on the Enforcement docket, warrants the exercise of its
22 prosecutorial discretion to dismiss certain cases. The Office of General Counsel has scored
23 MUR 6492 as a low-rated matter and has also determined that it should not be referred to the
24 Alternative Dispute Resolution Office. For the reasons set forth below, the Office of General
25 Counsel recommends that the Commission exercise its prosecutorial discretion to dismiss
26 MUR 6492.

27 This complaint stems from sample election ballots paid for and placed in the
28 *Sandusky Register* in late October and early November 2010, before the November 2 general
29 election, by the Erie County (Ohio) Republican Party ("ECRP"), a local party committee that
30 is not registered with the Commission. According to the complainant, Amy F. Grubbe, Chair

1 of the Erie County Democratic Party, when the ECRP's sample ballots first appeared in the
2 *Sandusky Register*, on October 29, they featured photographs of fifteen candidates in a 3x5
3 array, with the candidate's name and office sought accompanying each photograph. Thirteen
4 were candidates seeking state or local offices, but one, Rob Portman, was running for the
5 United States Senate, and another, Rich Iott, was running for the House of Representatives.

6 Ms. Grubbe advised ECRP Chairman Matthew Old that the advertisements should
7 have been paid for with "Federal dollars" and that Mr. Old should have the photographs and
8 other information pertaining to the two Federal candidates removed from the sample ballots.

9 Ms. Grubbe states that, following her conversation with Mr. Old, the Saturday, October 30
10 and Sunday, October 31 editions of the *Sandusky Register* ran the sample ballots without the
11 photographs and accompanying information related to Mr. Portman and Mr. Iott. On the day
12 before the election, however, Monday, November 1, Ms. Grubbe points out that the
13 newspaper ad again contained the sample ballot with photographs and references to the two
14 Federal candidates.

15 Citing the Commission's *Campaign Guide for Political Party Committees* ("*Guide*"),¹
16 Ms. Grubbe takes the position that the Committee's sample ballots did not constitute "exempt
17 party activities," because they were distributed as public political advertising in a newspaper.
18 Ms. Grubbe asserts that under the *Guide*, the ballots constituted "Federal election activity"
19 ("FEA") as a "public communication that refers to a clearly identified candidate for Federal
20 office and that promotes, attacks, supports or opposes a candidate for that office," which
21 should have been paid for with federal funds.²

¹ The Guide is available at <http://www.fec.gov/pdf/partygui.pdf>.

² The complaint also sets forth Ms. Grubbe's discussions with members of the Erie County Board of Elections, the Ohio Elections Commission, and legal counsel concerning this matter.

1 In response, the ECRP acknowledges that “a small amount of non-federal funds were
2 inadvertently used to pay for the publication” of the sample ballot political advertisements,
3 which it states cost only \$213.28 per day to run, for a total cost of \$639.84. Accompanying
4 its response, ECRP submitted an affidavit of Mr. Old, in which he states that, after being
5 telephoned by Ms. Grubbe on October 30 and “learning of the potential problem,” he
6 “immediately contacted the Editor of the *Sandusky Register* . . . and requested the names and
7 photographs of the Federal candidates be removed from the ads in the October 31 and
8 November 1 editions.” Affidavit of Mathew R. Old (“Old affidavit”) at 2. Mr. Old further
9 states that “despite my direction, the edited advertisement [omitting the references to the
10 Federal candidates] was not used in [the] November 1 edition.” *Id.* Based on these
11 contentions, the ECRP urges the Commission to dismiss this matter, because the amount at
12 issue is *de minimis* and because only two out of the fifteen candidates featured in the
13 unrevised advertisements were Federal candidates, the costs attributable to them represented
14 only a fraction of the total cost of the advertisements.³

15 As noted by the complainant, one form of FEA involves “public communications”
16 that refer to clearly identified candidates for Federal office and that support or promote the
17 Federal candidates, regardless of whether state or local candidates are also mentioned. See
18 2 U.S.C. § 431(20)(A)(iii); 11 C.F.R. § 100.24(b)(3). “Public communications” include

³ There are slight discrepancies between the complaint, response and the Old affidavit as to the date of the telephone conversation between Ms. Grubbe and Mr. Old. Ms. Grubbe states that uncorrected versions of the advertisements ran on October 29, after which she contacted Mr. Old, and that the October 30 and 31 advertisements were corrected, but the subsequent November 1 version was not. In addition, there are discrepancies concerning the number, publication dates, and costs of the political advertisements at issue. The response suggests that one version of the corrected advertisement and two uncorrected versions were run, with a cost of \$213.28 per day, for a total cost of \$639.84. Mr. Old's affidavit and the accompanying receipt, however, refer to publication dates of October 28, 30, 31 and November 1, 2010, with a total cost of \$853.12, representing a cost of \$213.28 per day. For the purposes of this report, we are assuming that the cost of the ads was \$853.12, as listed on the receipt, and that the uncorrected version of the ad ran for three days.

1 political advertisements disseminated by newspapers. *See* 2 U.S.C. § 431(22); 11 C.F.R.
2 § 100.26. Local party committees that engage in FEA must pay for it with funds that comply
3 with the limitations, prohibitions, and reporting requirements of the Act. *See* 2 U.S.C.
4 § 441i(b)(2)(A)(i); 11 C.F.R. § 300.32(a)(2).

5 Based on the information provided by the parties, the ECRP, a local party committee,
6 engaged in FEA, because the sample ballot advertisements that it placed in the *Sandusky*
7 *Register* constitute “public communications” that promote or support Federal candidates. As
8 such, the ECRP should have paid the full cost of the uncorrected advertisements with funds
9 that comply with the Act. Although it attempted to remedy its error promptly, it appears that
10 the ECRP may have engaged in FEA activity paid for with non-federal funds.

11 In addition to the advertisements at issue being FEA, their cost, as an independent
12 expenditure, could trigger the political committee registration and reporting requirements
13 under the Act. An independent expenditure is an expenditure for a communication that
14 expressly advocates the election or defeat of a Federal candidate, but is not coordinated with
15 a candidate or political party. 11 C.F.R. § 100.16(a). To determine whether the political
16 committee status and reporting thresholds in the Act are triggered by an independent
17 expenditure made on behalf of clearly-identified non-federal candidates, as well as clearly-
18 identified Federal candidates, the expenditure should be apportioned to determine the benefit
19 expected to be derived by the Federal candidates. 11 C.F.R. § 106.1(a)(1).

20 Here, two of the fifteen candidates promoted in the ad were Federal candidates.
21 Apportioning the \$213.28 cost of each ad shows that the apportioned cost for the Federal
22 candidates was \$14.22 per candidate per sample ballot, for a total cost of \$85.32 assuming

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1 the uncorrected version of the ad was run on three days.⁴ This cost falls well below the
2 reporting threshold for independent expenditures and the initial threshold for triggering
3 possible "political committee" status.⁵ See 2 U.S.C. § 431(4) (A) (defining a "political
4 committee, *inter alia*, as any committee that makes expenditures exceeding \$1,000 per
5 calendar year); see also 11 C.F.R. § 109.10(b) (persons who are not political committees
6 must report expenditures exceeding \$250 per calendar year).

7 **RECOMMENDATIONS**

8 In view of the small dollar amounts at issue concerning the use of non-federal funds
9 to pay for federal election activity, as well as the ECRP's prompt attempt at corrective action,
10 further enforcement action is unwarranted. Under EPS, the Office of General Counsel has
11 scored MUR 6492 as a low-rated matter. In furtherance of the Commission's priorities as
12 discussed above, the Office of General Counsel believes that the Commission should
13 exercise its prosecutorial discretion and dismiss this matter as to the Erie County (Ohio)
14 Republic Party. See *Heckler v. Chaney*, 470 U.S. 821 (1985). The Office of General
15 Counsel also recommends that the Commission remind the Erie County (Ohio) Republican
16 Party of the requirements under the Act and Commission regulations pertaining to federal
17 election activity by local party committees. See 2 U.S.C. § 441i(b)(2)(A)(i);
18

⁴ Because the ECRP is a party committee, this apportioned amount would need to have been paid with funds that comply with the prohibitions and limitations of the Act. See 11 C.F.R. § 106.7(b).

⁵ There is also no indication that the ECRP spent any sums on communications or other campaign activity arguably related to the nomination or election of a federal candidate other than the allocable portion of that ad at issue here.

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11 C.F.R. § 300.32(a)(2). Accordingly, the Office of General Counsel recommends that the
Commission dismiss MUR 6492, close the file, and send the appropriate letters.

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2/1/12
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